Supreme Court, U.S.
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CASE NO. 95-

In the

SUPREME COURT

of the

UNITED STATES

OCTOBER TERM, 1995

GEORGE PETER KOSISKY,
Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

Robert A. Zigmund, Esq.
Counsel of Record
714 The Chateau
1003 Easton Road
Willow Grove, PA 19090
(215) 657-1953
Attorney for Petitioner

Peter Paul Olszewski, Esq.
Luzerne County Courthouse
Wilkes-Barre, PA 18711
(717) 825-1674
Attorney for Respondent

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QUESTIONS PRESENTED FOR REVIEW

I. Whether or not the Petitioner's rights under the Fourth, Fifth, and Sixth Amendments to the United States Constitution were violated by the trial court's admission of a narrative statement and waiver of rights form in the Commonwealth's case in chief at the pre-trial suppression hearing and at trial ?

II. Whether or not the Petitioner's rights under the Fifth and Sixth Amendments to the United States Constitution were violated by the trial court's exclusion of lay witness testimony regarding the Petitioner's mental state ?

III. Whether or not the Petitioner's rights under the Fifth and Sixth Amendments to the United States Constitution were violated by the trial court's exclusion of lay witness testimony regarding the Petitioner's character and reputation ?

IV. Whether or not the Petitioner's rights under the Fifth and Sixth Amendments to the United States Constitution were violated by the trial court's failure to allow the Petitioner to call a Children & Youth Services worker as a hostile witness and in excluding the admission of the victim's statements made to Children & Youth Services during a bench trial under a condition that the records remain under seal ?

V. Whether or not the evidence presented at trial was sufficient to support the Petitioner's convictions for Aggravated Indecent Assault, Indecent Assault, and Corruption of Minors in violation of the Petitioner's rights under the Fifth and Sixth Amendments to the United States Constitution ?

VI. Whether or not the Pennsylvania Sentencing Guidelines and the sentencing court violated the Petitioner's rights under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution in denying the mentally retarded Petitioner's Motions for Extraordinary Relief, failing to honor Petitioner's request for Boot camp, House arrest, treatment , and/or probation ?

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OPINIONS BELOW

On February 29, 1996, the Supreme Court of Pennsylvania issued an Order denying the Petitioner's Petition For Allowance of Appeal which is not reported and has been appended hereto as Appendix A. The Superior Court of Pennsylvania issued an Order and Opinion affirming the Judgments of the Luzerne County Court of Common Pleas dated September 16, 1994, October 19, 1994, and December 16, 1994 which has not been reported and is appended hereto as Appendix B. The Orders and Opinions of the Luzerne County Court of Common Pleas are not reported and are appended hereto as Appendices C, D, and E .

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The final judgment of the Pennsylvania Supreme Court was entered on February 29, 1996 appended hereto as Appendix "A". This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1257.

CONSTITUTIONAL PROVISIONS, ORDINANCES, AND REGULATIONS INVOLVED IN THIS CASE

The Constitutional Provisions as well as the applicable statutes of Pennsylvania are lengthy and each has been set forth in the Appendix of this Petition.

STATEMENT OF THE CASE

This case is about the conviction of a sixty-five (65) year old man for aggravated indecent assault and corruption of

a minor in violation of his Constitutional rights and without concern for his mental defects.

On or about January 26, 1993, a criminal Complaint was issued against the Petitioner, a sixty-four (64) year old, mildly mentally retarded individual, (R. 19A) in this matter, setting forth five (5) charges under Pennsylvania Law as follows: Aggravated Indecent Assault, 18 Pa. C.S.3125(1), (6); Indecent Assault, 18 Pa..C.S.3126(a)(1),(6); Corruption of Minors, 18 Pa. C.S. 6301(a), along with a Probable CauseAffidavit, setting forth a date of the Offense as April 1992 (R. 3A-4A).

On October 7, 1993, Counsel for Petitioner filed an Omnibus Pretrial Motion for suppression of a narrative statement and waiver of rights form obtained by the Pittston City Police Department from the Petitioner on January 26, 1996 as well as a Notice of Insanity or Mental Infirmity Defense (R. 10A-25A).

On September 15, 1994, a Pretrial Hearing was held on Petitioner's Omnibus Pretrial Motions, at which time the Respondent called Chief of Police Edward Doran of the Pittston City Police Department as the sole witness for the prosecution., who testified that on January 26, 1993, he interviewed the Petitioner knowing that the Petitioner was a suspect in this case and had provided the Petitioner with a waiver of rights form and took notes regarding his questioning of the Petitioner (R. 73A-111A). He further testified that the only persons present during the interview were the Petitioner, Chief Doran, and Officer Policare (R. 73A-111A). Chief Doran further indicated that he did not notify the Public Defender's Office, or any attorney that he was going to conduct an interrogation of Petitioner (R. 94A, lines 20-23), and neither did he inform the Petitioner that he could bring an attorney with him (R. 94A-95A). Chief Doran noted the start time of the interview as 2:10 p.m., but failed to record the stop

time (R. 86A). At the conclusion of the interview, Chief Doran testified that his notes were transcribed by Officer Policare to a narrative statement, (R. 96A, lines 21-23, 97A, lines 2-3) of the Petitioner and that he destroyed his notes. Chief Doran further testified that this interview/interrogation was conducted behind an electronically locked door (R. 87A). Additionally, Chief Doran further indicated that he neither asked the Petitioner if he could read, nor whether or not the Petitioner had any physical or mental impairments. Chief Doran further admitted that he did not show the Petitioner how to leave the interview room, did not ask Petitioner his educational background, employment history, or present intake of medication.(R. 87A-93A). Chief Doran further indicated that he placed a " Yes " next to each question indicated on the waiver form, and that the Petitioner later signed the form. (R.94A). Chief Doran admitted that no court stenographer was present during said interview, that he destroyed the notes of the interview, that the narrative statement was not verified by the Petitioner , that the Petitioner did not apply his signature to the narrative statement, that Officer Policare transcribed his notes onto the typewritten narrative statement and that he did not observe anything physically abnormal about the Petitioner(R.96A- 99A). Chief Doran further testified that the Petitioner's speaking was clear and that he never asked the Petitioner if he was mentally retarded(R. 100A-101A). Over objection of Petitioner's Counsel, the waiver form documented as Commonwealth's Exhibit #2 and the Narrative Statement, documented as Commonwealth's Exhibit #1, were admitted (R. 111A).

The Petitioner called Paulette Day, a licensed psychologist who testified that the Petitioner's I.Q., was 68, falling within the area of borderline intellectual functioning, that the Petitioner was in the mild range of retardation, and

agreed that the Petitioner had a cleft palate (R. 127A-132A). Lastly, the Petitioner called Mr. Andrew Kasisky, who testified that the Petitioner has speech difficulties, and frequently becomes lost and confused(R.135A-144A).

On September 16, 1994,Luzerne County Judge Conahan filed an Order denying Petitioner's Pretrial Motions.(Appendix C) On October 11, 1994, the Petitioner filed a Notice of Appeal to the Superior Court pursuant to the Order of Judge Conahan, dated September 16, 1994 which was later disregarded by the trial court as interlocutory.

On October 18, 1994, and October 19, 1994, the Petitioner was tried without a jury, by a bench trial, presided over by Luzerne County Judge Toole. At said bench trial, the Respondent presented his case and the Respondent called Casey Kasisky (R.173A-197A), during which testimony, the Court sustained the Respondent's objection when Counsel for Petitioner was questioning said witness regarding Petitioner's confusion (R. 187A, lines 19-23); and during which time, said witness made numerous references to the Petitioner's touching her (R. 177A, line 25; p. 179A, lines 5-6; p.190A, lines 10, 13, 23; p.191A, lines 5-12; p.193A, lines 16-20; p.195A, lines 2-8; p.200A, lines 17-18; p. 201A, lines 12-15), and stated once that the Petitioner touched her inside her vagina on direct examination.(R. 179A, line 17). Casey Kasisky further testified that the Petitioner had threatened to hurt her brother (R. 181A, line 8-9, p.193A, lines 6-7). The Respondent called Diane Collins (R.198A-202A), and said witness testified that Casey Kasisky told her that her uncle had touched her (R.200A, lines 17-18; p. 201A, lines 12-15). The Respondent called Debra Van Horn (R.202A-206A), who was withdrawn by the Commonwealth. The Respondent called Chief Edward

Doran of the Pittston City Police Department (R. 206A-230A), during which testimony, the Court admitted into evidence in the state's case in chief, over the objection of Counsel for Petitioner, Commonwealth's Exhibits #1 (Waiver form) and Exhibit #2 (Narrative Statement) (R.231A, lines 17-19). Mr. Doran testified substantially the same as in the pretrial hearing (R. 220A;.222A; 223A-224A; 224A; 225A; 227A; 228A). The Respondent called Dr. Lauren Argenio (R.. 232A-241A), who testified in part that she had examined Casey Kasisky and that her exam revealed that the external genital exam of Casey Kasisky indicated no significant trauma (R. 235A); that she did not conduct an internal genital exam (R. 235A); that there was nothing noted in the labia, labia majora, labia minora, and vestibule (R. 236A); that it would be impossible to say whether or not penetration had occurred (R. 238A, 241A); and that no trauma, abrasions, redness, or scratches were visible on Casey Kasisky (R. 240A). The Respondent called Michael Kasisky, father of the alleged victim (R. 242A-253A), who testified in part that he admitted waiting approximately nine months to report this incident to the Pittston police (R. 245A,249A); that he did not notify any governmental agency within the nine months from the incident (R. 250A),and that to his knowledge, Casey Kasisky was not prescribed any medications or ointments for treatment by Dr. Argenio (R.251A). During said testimony of Michael Kasisky, the Court sustained an objection by the Respondent when Counsel for the Petitioner questioned Michael Kasisky regarding Petitioner's intelligence level and mental condition (R. 252A, 253A).

The Petitioner presented his case and called Andrew Kasisky (R.254A-273A), who testified that the Petitioner had resided with him for three years prior to 1992 and all times afterward (R. 254A); that the Petitioner did not know why the police wanted to interview him (R. 257A-258A); that the

Petitioner does not understand what one is telling him half of the time (R.259A); that the Petitioner occasionally gets confused (R. 260A-261A); that the Petitioner thought that "vagina" was synonymous with "underpants" (R. 262A); that the Petitioner did not understand and was unable to read the police report identified as Commonwealth's Exhibit #1 (Narrative Statement) (R. 262A); that the Petitioner thought that he could sign his name to the waiver form (Commonwealth Exhibit #2) and go home; and that the petitioner does not read and only signs his name (R. 262A-263A). The Petitioner called Cheryl Kasisky (R. 273A-280A). During her testimony , the Court sustained objections of the Respondent, and prevented said witness from testifiying regarding her observations of the Petitioner (R. 274A); the Petitioner's character (R. 275A); the mannerisms of Petitioner (R. 277A); and the Petitioner's mental capacity (R. 278A). The Petitioner called Marie Kasisky (R.285A-288A). During her testimony, the Court sustained the Respondent's objection regarding Counsel for Petitioner's questioning regarding whether or not the Petitioner was a law abiding citizen (R.288A). The Petitioner called George Kosisky (R. 288A-302A); who testified, and was at times difficult to understand (R. 290A, lines 18-20; 292A, line 10-11; 295A, line 18, 298A, line 13-14); and who indicated that Casey Kasisky took a blanket and put it over him so that her brother could not see what she was doing (R. 291A); that she touched him; that he told her to go to bed after she touched him; that he did not threaten her (R. 292A); that he admitted that he attempted to pull up her pants and that he did not touch her body at all (R. 293A); that he put his hand inside of her pants to pull them up, and she then went to bed (R. 293A); that he

did not know why he was going to the police station (R. 293A); that he denied saying that he put his finger inside Casey Kasisky's vagina (R. 295A); that he thought that " vagina " meant " underwear " (R.295A, line21, 296A, line3); that he did not understand what the police were saying during interrogation (R. 299A, lines4-5); and that Casey slid off of his lap, her pants fell down, and that he tried to pick them up (R. 300A-302A).

The Petitioner called Joanne Van Suan (R.314A-332A), who testified in part, that she was employed by Children and Youth Services, that she opened this case on March 11, 1992, and closed this case on April 29, 1992 (R. 321A); that Casey Kasisky told her that the Petitioner was touching her pee-pee and butt with his hand under her clothing , ...that he hurt me pushing against my pee-pee ..."(R. 324A) and that he told her not to say anything or he would beat her(R. 324A); that she found no trauma or physical injury (R. 328A-329A). During the course of Ms. Van Suan's testimony, the Court denied Counsel for the Petitioner's request to treat said witness as a hostile witness (R. 326A, lines 4-11); and the lower Court further sustained an objection precluding the admission of statements made to Children and Youth Services, by the victim, Casey Kasisky (R. 332A, lines 21-22).

There were two additional witnesses who were not permitted to testify, but were recognized by the Court as supplemental character witnesses, namely, Andrew Kasisky, Jr., and Monique Kasisky (R. 281A).

The Court then heard closing arguments by both Counsel for the Respondent and the Petitioner, and the Court conducted a question and answer session and commented that

the Petitioner cannot read, that he was difficult to understand, and that he had difficulty verbalizing (R. 353A). Furthermore, the Court noted that it had difficulty in analyzing the Narrative Statement of the Petitioner taken by the Pittston Police Department , and the actual presentation of the Petitioner's testimony, and that the Court had " difficulty concluding that the statement was made by that person that easily " . (R. 353A, 354A, lines 6-14). Counsel for Respondent admitted that if the Narrative Statement were excluded from the evidence, " it is a closer call, but I still believe it is sufficient " . (R. 356A, lines 22-24). Lastly, the Judge did not know of the existence of any law requiring that penetration be proven by medical testimony (R. 357A).

On October 19, 1994, Luzerne County Common Pleas Judge Toole found the Petitioner guilty of Count II, Aggravated Indecent Assault, 18 Pa.C.S. 3125(6); Indecent Assault,18Pa.C.S. 3126(6); and Corruption of Minors, 18 Pa. C.S. 6301(a); and continued the Petitioner's bail .(Appendix D).

On December 16, 1994, Petitioner appeared for sentencing on the above-referenced charges, at which time, the trial court denied Petitioner's Presentence Motions for Extraordinary Relief (R. 54A) including a challenge to the sufficiency of the evidence, a Motion for Arrest of Judgment, a Motion for Judgment of Acquittal, or a Motion for a New Trial , based on a violation of the 4th, 5th , 6 th, and 14th Amendments to the U.S. Constitution, as well as paragraph 1, section 9, of the Pennsylvania Constitution, and Pa. R. Cr. P. 1124(a)(5); 1405 B.(1); and requested boot camp placement and/or house arrest .(R. 43A -47A). The Court entered a sentence against Petitioner on the Aggravated Indecent Assault Charge in the form of twenty-four (24) to

forty-eight (48) months incarceration at a State correctional facility, merged Indecent Assault with the Aggravated Indecent Assault Charge, and ordered six (6) to twelve (12) months on the Corruption of Minors Charge to be served concurrently with the (24) to (48) month sentence (R. 43A-60A). (Appendix E)

On December 22, 1994, the Petitioner filed a Notice of Appeal to the Superior Court of Pennsylvania, filed his brief Brief and Reproduced Record , and oral argument was held before the Superior Court. On August 16, 1995, the Superior Court entered a Memorandum Decision affirming the orders of the Luzerne County Court of Common Pleas. (Appendix B and B-1) Thereafter , the Petitioner filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania which was denied by order of said court on February 29, 1996. (Appendix A) Thereafter the Petitioner was incarcerated and remains incarcerated at the time of this Petition. This matter is now currently before this Court.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. Decision in Conflict with Applicable Decisions of this Court and the United States Constitution.

The United States Constitution which includes the 4th, 5th, and 6th Amendments to the United States Constitution, operative against the States through the 14th Amendment (Appendix F) to the United States Constitution, serve as an individual' s shield against oppressive criminal prosecutions by local , state and federal officials and entities. The questions

presented for review in this appeal are directly related to violations of the Petitioner's rights to be secure in his person from unreasonable searches and seizures; his right not to be compelled in a criminal case to be a witness against himself; his right not to be deprived of life, liberty, or property without due process of law; his rights to be informed of the nature and cause of accusation ; to be confronted with witnesses against him, and to have the assistance of counsel.

The Commonwealth's actions by and through the Pittston City Police Department in securing a "waiver " of rights form and a "narrative" statement of the mentally retarded Petitioner andthereafter proffering same as a confession at trial in it's case in chief struck directly at the heart of the Petitioner's individual Constitutional rights. approval of the conduct of the police officials in this case by any court validates an unconstitutional deprivation of the Petitioner's Constitutional rights. The Potential for abuse of these rights is manifest and a determination regarding the efficacy of the police procedure followed in this case presents serious issues of imperative public importance to the entire criminal justice system and society in this country .

The lower courts have misconstrued the facts and circumstances of the mentally retarded Petitioner's interrogation which was conducted behind an electronically locked door with policeofficers, without the presence of counsel for the Petitioner and with the mentally retarded Petitioner. The Superior Court of Pennsylvania reasoned that the Petitioner's statements were offered knowingly and intentionally. The Pennsylvania Superior Court was incorrect in factually determining that the Petitioner's interrogation was conducted behind an unlocked door when the Reproduced Record indicates that the Petitioner was subjected to

interrogation behind an electronically locked door and was not free to leave.(R. 220 A). Furthermore, the Pennsylvania Superior Court apparently rejected the authorities of the Petitioner and affirmed the trial court, thereby contradicting the United States Constitution and the law of this Court.

The Fourth Amendment to the United States Constitution provides :

> "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, should not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly, describing the place to be searched, and the persons to be seized."

The exclusionary rule set forth in **Mapp v. Ohio 367 U.S. 643, 81 S. Ct. 1684, 6 L.Ed. 2d 1081 (1961)** serves as a deterrent to future violations of Fourth Amendment violations.

The Fifth Amendment to the United States Constitution provides that:

> "no persons shall be held to answer for any capital offense, or otherwise infamous crime, unless upon presentment or indictment of a Grand Jury, excepting cases arising in the land or naval forces, or in the militia, with an actual service and time of war or public danger; nor shall any person be subject for the same offense to betwice put in jeopardy or of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property without due process of law; ...".

In addressing the Fifth Amendment to the United States Constitution, this Court previously rectified previous rights violated by authorities in the Commonwealth in the cases of **Turner v. Commonwealth of Pennsylvania** 338 U.S. 62, **Johnson v. Commonwealth of Pennsylvania** 340 U.S. 881 as well as authorities in Alabama in **Fikes v. Alabama** 352 U.S. 191 and Connecticut in **Culombe v. Connecticut** 367 U.S. 568, 81 S. Ct. 1860, 6 L. Ed. 2d 1037

The Sixth Amendment of the United States Constitution provides that:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district, wherein the crime shall have been committed; which district shall have been ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense".

In order for a confession to be admissible, it must be a voluntary, free and unconstrained statement. **Culomb v. Connecticut**, 367 U.S. 568, 81 Supreme Ct. 1860, 6 L.Ed.2d 1037 (1961). All circumstances must be considered including: the duration and methods of interrogation; length of delay between arrest and arraignment; conditions of detainment; attitude of police; defendant's physical and psychological state; and all other conditions which may serve to drain one's power or resistance to suggestion or to undermine one's self determination. **Culomb v. Connecticut**, Supra; **Commonwealth v. Boyd**, 461 Pa. 17, 30-32, 334 A.2d 610, 617-618 (1975); **Commonwealth v. Parvis**, 458 Pa. 359, 326

A.2d 369; **Commonwealth v. Simms**, 455 Pa. 599, 317 A.2d 265 (1975). The Commonwealth must establish by preponderance that a confession was voluntary and that a waiver of Constitutional Rights was knowing, and intelligent. **Commonwealth v. Bullard**, 465 Pa. 341, 350 A.2d 797 (1976); **Miranda v. Arizona**, 384 U.S. 436, 86 Sup. Ct. 1602, 16 L.Ed. 2d 694 (1966); **U.S. v.Herrold**, 962 F.2d 1131 cert denied, 113 F.Supp. 421, 121 L.Ed.2d 344 (1992); **Commonwealth v. German**, 621 A 2d. 589, 423 PA. Super 393 (1993). The question of consent is a factual question determined from all of the circumstances. **Commonwealth v. Mason**, 628 A2d 1141 (PA. Super 1993).

In **Commonwealth v. Richman**, 320 A 2d 351, 458 Pa . 167 (1974), where detectives did not inform the defendant of the charge against him or purpose of a lineup, the defendant's oral and written declarations waiving his right to counsel were not knowing and intelligent and his right to counsel was not waived. Where a defendant was " mixed up " , it was not an effective waiver of counsel. **Commonwealth ex. Rel. Gordon v. Myers**, 227 A.2d 640 (1967). The failure to apprise the defendant of the charge and penalties rendered a waiver of counsel not knowing and intelligent. **Commonwealth v. Brobst**, 449 A2d. 628, 303 PA. Super 161 (1982). Where a defendant signed a statement prepared by the state waiving the appointment of counsel, it was insufficient to establish that there was an understanding and intelligent waiver. **Commonwealth ex. Rel. Ross v. Bojula**, 211 A 2d. 42, 206 PA. Super. 1 (1965).

For purposes of the 5th Amendment right not to incriminate oneself, in **Commonwealth v. Hull**, 46 D C 3d 473 (1986), the court held that statements obtained from a

deaf student after arrest without an interpreter will be suppressed. The determination of " custody " is done on a case by case basis. **Patterson v. Cuyler**, 759 F. 2d 925 (1984). Consequently, if **Miranda** is violated, the prosecution may not use a suspect's responses to custodial interrogation in its case in chief. **Commonwealth v. Henry**, 599 A. 2d. 1321, 410 PA. Super 324 (1991).

In addition to the foregoing, a documented statement is admissible if it is authenticated and relevant. **Commonwealth v. Brooks**, 508 A 2d 316, 352 PA. Super 394 (1982). In reviewing a suppression order, the scope of review for the Lower court was to determine whether the record supports the lower court's findings of fact, inferences, and conclusions of law. **Commonwealth v. Baker**, 445 A. 2d. 544, 299 PA. Super 241 (1982); **Commonwealth v. Volk**, 444 A2d. 1182 (PA. Super 1982). The court should consider only the evidence of the prosecution's witnesses and so much of the evidence of the defense as fairly read in the context of the record as a whole remains uncontradicted. **Id.**; **Commonwealth v. Thomas**, 425 A. 2d 1151, 284 PA. Super 375 (1981); **Commonwealth ex. Rel. Lutz v. Lutz**, 444 A 2d. 1281, 298 PA. Super 473 (1982).

This Court ruled in **Michigan v. Harvey** 110 S. Ct. 1176 (1990) reaffirming **Michigan v. Jackson** 475 U.S. 625, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986) that once a defendant invokes the right to counsel, a subsequent waiver even if knowing, voluntary, and intelligent is presumed invalid and cannot be admitted in a state's case in chief. Also, the defendants right to counsel at a pretrial interrogation attaches when a state attempts to elicit information directly from an

accused. **Brewer v. Williams** 430 U.S. 387, 97 S. Ct. 1232, 15 L. Ed. 2d 424 (1977).

In the case at bar, the record fully supports the findings that the sole witness called to authenticate the Narrative Statement and the Waiver Form (Commonwealth's Exhibits #1 and 2, respectively) (R.361A-362A), was Chief Doran who testified that he presented the Waiver Form to the Petitioner, read the questions, and placed a " Yes" pursuant to the Petitioner's alleged responses (R.94A). Also, uncontradicted information derived from the Petitioner included that the Petitioner was a suspect at the time of questioning (R.94A, line 15); that the only persons present during the interrogation were the Petitioner, Chief Doran, and Officer Policare (R. 73A-111A); that Chief Doran did not notify the Luzerne County Public Defenders Office, or any attorney, regarding the interrogation; and further, that he did not inform the Petitioner that he could bring an attorney with him. (R. 94A-95A); that the stop time of theinterrogation was not noted (R. 86A); that " notes " were transcribed by another Officer to a narrative report (R. 96A-97A); and that, he then destroyed his notes (R. 96A-99A); that the interview was behind an electronically locked door and that he did not ask Petitioner if he had any mental impairments, physical impairments, or consumed any medication (R. 87A-93A); that he did not ask Petitioner whether or not he could read English (R. 223A-224A); that the narrative statement was neither signed by the Petitioner, Chief Doran , nor Officer Policare (R. 96A-99A), and that the Petitioner's speaking voice was clear (R. 100A-101A), which incidentally, was contradicted in the record by the trial Judge and the Court stenographer, both of whom indicated that the Petitioner was hard to understand (R.290A, lines 18-20; 292A, lines 10-11; 295 A, line 18; 298A, lines 13-14; 353A; 354A).

Additionally, the Petitioner produced Paulette Day, a licensed psychologist, who testified that the Petitioner's I.Q. was 68, falling within the borderline intellectual functioning; that the Petitioner was in the mild range of mental retardation, and that Petitioner had a cleft palate (R.127A-132A). Furthermore, Andrew Kasisky testified to Petitioner's speech difficulties, and Petitioner's confusion (R. 135A-144A).

Consequently, under the principles established under the 4th , 5th, 6th, and 14th Amendments of the U.S. Constitution, as well as the foregoing case law and facts, the Superior Court should have recognized these authorities and the lower court should have suppressed the Waiver Form and Narrative Statement (Commonwealth's Exhibits #1 and 2) and overturned the Petitioner's convictions. Consequently, it is incumbent upon this court to reverse the lower courts for failing to follow the law as previously set forth .

2. Decision in Conflict with Decisions of this Court and another United States Court of Appeals on the Same Matter.

Secondly, regarding the evidentiary issues of the admissibility of lay witness testimony of the mentally retarded Petitioner's mental state, the lower courts reasoned that the observations of the Petitioner's prospective witnesses were "inappropriate and impermissible hearsay and/or irrelevant." The Reproduced Record of trial does not indicate the reasons of the trial court which excluded such testimony on such bases and it is unknown from what source the Superior Court discovered or inferred this proposition . Furthermore, the Lower Court relied solely on the case of **Commonwealth v. Wallace** , 522 Pa. 297, 561 A. 2d 719 (1989), a 1989

decision of the Pennsylvania Supreme Court and disregarded the Petitioner's authorities set forth in **Commonwealth v. Ruth**, supra, **Commonwealth v. Knight**,supra and **U.S. v. Hill**, supra. Consequently, questions involving the appropriate scope of admissibility of lay witness testimony are of significant importance and would serve to establish uniformity in the application of legal principles involved herein.

The Superior Court ignored the legal principles that in Pennsylvania, a lay witness can testify on the mental state/capacity of another individual. **Commonwealth v. Ruth**, 455 A2d 700 (PA. Super 1983); **Commonwealth v. Knight**, 364 A. 2d 902(PA 1976). In **U.S. v. Hill**, 655 F. 2d. 512 (1981), the court found that the trial court erred in refusing the defendant to call a psychologist to testify on the defendant's characteristics, subnormal intelligence, susceptibility to persuasion and psychological pressure.

Furthermore, this court held in **Washington v. Texas** 388 U.S. 14, 18 L. Ed. 2d 1019, 87 S. Ct. 1920, (1967), that a defendant can call witnesses to testify to personal observations which are relevant and material to the defense.

In the case at bar, the trial court sustained the objections of the Commonwealth for questions that counsel was asking lay witnesses regarding the Petitioner's mental state (R.187A, lines 19- 23); 252A; 253A; 274A; 275A; 277A; 278A; 288A. Consequently, under the legal principles of **Ruth**, **Knight**, **Washington** and /or **Hill**, Supra; the trial court erred in prohibiting the introduction of evidence on lay witness testimony of the Petitioner's mental state and this Court should reconcile these issues which are of great importance to the criminal justice system in this Commonwealth.

3.Important Questions of Law Which Should be Settled by this Court

Third, regarding the evidentiary issues of the admissibility of lay witness testimony of the mentally retarded Petitioner's character and reputation, the lower court had reasoned that "enough" evidence was allowed by the trial court relying on **Commonwealth v. Brothers** 409 Pa. Super. 202, 597 A. 2d 1164 (1991), and **Commonwealth v. Mason**, supra. The lower Court disregarded the principles set forth by the Petitioner in the decision of **Commonwealth v. Neely**, infra. , as well as the Defendant Petitioner's Fifth and Sixth Amendment rights. Consequently, the decision of the Lower Court is in apparent conflict with a previous decision of the Pennsylvania Supreme Court as well as the United States Constitution and a reconciliation of the admissible scope of lay witness testimony of a mentally retarded defendant's character and reputation are of great importance and a determination regarding the issues would better serve to establish uniformity in the application of legal principles involved herein.

The Superior Court did not address **Commonwealth v. Neely**, 561 A2d 1 (Pa. 1989), which noted that the value of a good reputation has been highly regarded as antiquity, and that the value of reputation evidence is high; that often, a person takes a lifetime to build his reputation,and when dark clouds of life gather, one's reputation may be all that one has to ward off the impending downpour; that moment of truth may be the only beacon of truth; and that truth is reputation's reward. The court, in **Neely**, reversed the defendant's conviction for failure to charge the jury on reputation evidence.

In the case at bar, the trial court precluded the introduction of reputation evidence by the Petitioner's witnesses Cheryl Kasisky (R.275A), and Marie Kasisky (R. 288A); Andrew Kasisky and Monique Kasisky (R. 281 A). Consequently, under the principles of **Neely**, as well as the Petitioner's Fifth and Sixth Amendment rights, the trial court should have received evidence on the Petitioner's character from these additional witnesses. The lack of introduction of this evidence lessened the Petitioner's ability to counter the Commonwealth's case, to establish reasonable doubt and prejudiced the Petitioner's case. As a result, this court should grant the Petitioner's appeal and reverse the Petitioner's conviction.

The issues of calling Children & Youth Services investigators as hostile witnesses, and admitting Children & Youth Service Documents **under seal in a bench trial** are not issues which have been reconciled by this Court. The lower court had reasoned, following **Commonwealth v. Bartley** 395 Pa. Super. 137, 576 A. 2d 1082 (1990) and **Commonwealth v. Wilson** 529 Pa. 268, 602 A. 2d 1290 (1992), that a trial court possesses discretion to allow or disallow the treatment of hostile witnesses and that an absolute privilege exits between a victim and a counselor. In this case, the Children & Youth Services offered no counseling to the victim, but instead operated as an investigative arm of the Luzerne County District Attorney's Office and the Pittston City Police Department.

This Court in **Pennsylvania v. Ritchie** 480 U.S. 39, 94 L. Ed. 2d 40, 107 S. Ct. 989 (1987) ruled that under due process analysis a defendant is entitled to have Children & Youth Service documents reviewed by the trial court to

determine whether or not information in the file could have changed the outcome of the trial.

The Superior Court failed to cite or recognize the authorities, including, principles establishing that leading questions are allowed, within the discretion of the trial court, to lead the witness to the subject of inquiry and where modesty and delicacy preclude full answers to general questions. **Watson Appeal**, 450 PA. 579 (1973); **Commonwealth v. UpChurch**, 355 PA. Super.425, 513 A2d. 995 (1986); **Commonwealth v. Reidenbaugh**, 282 PA. Super 300, 422 A2d. 1126(1980); **Commonwealth v. Walters**, 233 PA. Super 83, 334 A2d. 731 (1975); **Commonwealth v. Voci**, 185 PA Super 563, 138 A 2d 232 (1988); **Commonwealth v.McGuiness**, 204 Pa. Super 75, 203 A. 2d. 326 (1964).

In the case at bar, the trial court failed to allow Petitioner the ability to treat Ms. Van Suan as a hostile witness (R. 326A lines 4-11), and refused to receive Children and Youth Services' documents (R. 332A, lines 21-22). Counsel for Petitioner argues that under the aforementioned case law as well as the Petitioner's Rights under the Fifth and Sixth Amendments to the United States Constitution , that he was entitled to treat this witness as hostile and ask leading questions of her regarding statements made by the victim at or near the time of the alleged incident which would have promoted justice and fairness by having all relevant issues and evidence before the court. The issue of credibility was a major factor between the alleged victim and the Petitioner and the treatment of this witness as hostile would have promoted a full and fair disclosure of all statements made and ensured due process of law.

Counsel for Petitioner does recognize that Pennsylvania case law and statutes "shield " a sexual abuse counselor from testimony and documentation as set forth in the cases of **Commonwealth v. Aultman**, 563 A.2d 1210, 387 PA. Super 113, and **Commonwealth v.Wilson**, 602 A2d 1290, 529 PA 268, 42 PA. C. S. 5945.1. But in this case, the parents of the alleged victim consented to the release of the Victim's Resource Center counseling records which were not utilized by the Petitioner. Children Youth Service records were provided to Petitioner (R. 68A) but were prevented from introduction in a bench trial under seal and were not even reviewed by the trial court. In this case, a bench trial was conducted and Petitioner's counsel requested the Judge to accept the Children and Youth records (approximately 4-5 pages) under seal (R. 315A-316A) which contained statements which contradicted the victim'stestimony,especially on the issues of whether or not penetration had occurred to the victim and whether the Petitioner had in any way threatened anyone . Consequently, it was error for the trial Court not to allow Ms. Van Suan to testify as a hostile witness, and/or to allow the introduction of the proposed exhibits presented by the Petitioner, within which the victim had made statements to Children and Youth Services to the effect: "touching her pee-pee and butt with his hand under her clothing "(R. 324A, lines 14-15) and "he told her not to say anything or beat me " . (R. 324A, lines 23-24). These statements were in contradiction to the victim's testimony on direct exam at trial where she testified two years and nine months later, he touched inside her vagina, (R.179A, line 17), that the Petitioner had threatened to hurt her brother (R. 193A, lines 6-7), and that the only thing that happened was that he touched her and he took his hand and she touched him (R. 191A, lines 5-12). Counsel for Petitioner believes that this alleged victim was conditioned for her testimony by the Commonwealth as she

had met with the prosecutor on at least four occasions (R. 184A, lines 13-24), and that the more reliable statements would be those that she provided to Ms. Van Suan at or near the time of the incident where she had not indicated that Petitioner had inserted his finger into her vagina. Consequently, the trial court erred in refusing the admission of the Children and Youth Service records under seal during this bench trial, and violated the Petitioner's Fifth Amendment rights of due process as well as the Petitioner's Sixth Amendment rights to confrontation. Consequently, an apparent conflict exists in the application of legal principles which must be reconciled by this Court, and all of which are of great importance in criminal prosecutions within this Commonwealth.

Next, regarding the issues of the sufficiency of the Commonwealth's evidence to sustainthe convictions of the mentally retarded Petitioner for Aggravated Indecent Assault, Indecent Assault, and Corruption of Minors, the lower court, other than citing the statute, 18 Pa.C.S.3125, which is a relatively new statute, reasoned that the "evidence supports the finding Petitioner indecently assaulted his nine-year old niece... and the evidence was sufficient to establish each element of the offenses with which he was charged." The lower court did not specifically address whether or not the evidence was sufficient beyond a reasonable doubt;further the lower court had relied on case law specifically addressed to Indecent Assault not Aggravated Indecent Assault; and further did not address the Corruption of Minors charge.Consequently, it is imperative for this court to rule on the sufficiency of evidence for a finding of guilt beyond a reasonable doubt on a charge of Aggravated Indecent Assault where the greatest weight of evidence presented at trial only involved "touching" of a victim; where

no medical evidence corroborated penetration of the victim; and where, a victim apparently testified two years later at trial, after being conditioned for testimony by the District Attorney that penetration had occurred. This Court has not addressed these issues which must be reconciled in this Commonwealth in order to establish principles and uniformity in application of legal principles involved in cases involving charges of these type, especially since no case law is evident on the new Aggravated Indecent Assault statute of the Legislature of Pennsylvania.

The Pennsylvania Superior Court failed to recognize the authorities set forth by the Petitioner indicating that in reviewing the sufficiency of evidence, a court should accept as true all evidence upon which the fact finder could properly have reached its verdict and give the verdict winner the benefit of all reasonable inferences,**Commonwealth v. Sanders**., 445 A 2d 820, 299 PA. Super 410 (1982), and determine whether such evidence and inferences are sufficient in law to prove guilt beyond a reasonable doubt. **Commonwealth v. Payne**, 445 A2d 804, 299 PA.Super 378 (1982). Further that relief from a conviction can be granted where the evidence is insufficient to establish guilt beyond a reasonable doubt. **Commonwealth v. Cody**, 401 PA.Super 85, 584A2d. 992 (1991). Absent abuse of discretion in fulfilling function of evaluating the evidence in a criminal prosecution, passing upon credibility will not be disturbed on appeal. **Commonwealth v. Monroe**, 422 A. 2d. 193, 281 PA. Super. 328 (1980). A New trial can be granted or an arrest of Judgment may be appropriate for wrongful introduction of evidence. **Commonwealth v. Glasco**, 444 A 2d. 724, 298 PA. Super 189, affirmed 468 A2d 1095, 503 PA 124.

In this case, the Petitioner was charged with six counts, three of which were brought to trial, to wit: Aggravated Indecent Assault 18 PA. C.S. 3125; Indecent Assault 18 PA. C.S. 3126; and Corruption of Minors 18 Pa. C.S. 6301 (Appendix F).

No interpretative case law is found regarding Aggravated Indecent Assault, 18 Pa. C.S. 3125(a)(6), but in **Commonwealth v. Bailey**, 510 A2d. 367, 353 PA. Super 390 (1986), the testimony of insertion combined with a physician's testimony of abrasions and injury was sufficient for upholding a conviction for Indecent Assault under 18 Pa. C.S. 3126 (a)(6).

In the case at bar, numerous references have been made by the victim to " touching ", (R.177A, line 25; 179A, lines 5-6; 190A, lines 10, 13, 23; 191A, lines 5-12; 193A, lines 16-20; 195A, lines 2-8; 200A lines 17-18; 201A, lines 12-15), and the victim even admitted on cross exam that the Petitioner " touched " her and she " touched " him (R. 191A, lines 5-12). The only other witness was the Petitioner who testified that he did " touch " her to pull up her pants (R. 293A), and that after she touched him, he told her to go to bed (R. 292A), and that he did not touch her body (R.293A); that he denied inserting his finger into her vagina (R. 295A), and that he thought " vagina " meant " underwear ", when the police were questioning him (R.295A, line 21; 296A, line 3). Furthermore, the medical evidence presented did not indicate any trauma; nothing noted in her labia (majora or minora), or vestibule; penetration was uncertain; no abrasions, redness, or scratches (R. 235A-240A). Michael Kasisky, father of the victim, testified that he was not aware of any medical treatment

prescribed by Dr. Argenio (R. 250A, lines 24-25; 251A, lines 1-2). Couple this testimony with that of the Petitioner (R. 288A-302A), Andrew Kasisky (R. 254A-273A), Cheryl Kasisky (273A-280A), Marie Kasisky (285S-288A),

and Ms. Van Suan (316A-332A), the charges were not proven beyond a reasonable doubt. And, the Respondent had indicated, in part, that excluding Petitioner's confession, would have made "it a closer call ", and should indicate to this court that a significant reasonable doubt exists as to proving penetration, an essential element of the Aggravated Indecent Assault charge, as well as the Petitioner's testimony, that he tried to pick up the victim's pants, an exception to the Aggravated Indecent Assault and Indecent Assault charges.Consequently, this court should review the conviction of the Petitioner.

Regarding the issues of the mentally retarded Petitioner's sentencing, the lower Court did not address the fact that the Petitioner suffers from mild mental retardation vis a vis the trial court's order sentencing the Petitioner to a State Correctional Facility for a term of 24 - 48 months. The lower court had relied on **Commonwealth v. Koren** 435 Pa. Super. 499, 646 A. 2d 1205 (1994) and apparently disregarded **Commonwealth v. Sypin**, infra, which sets forth the principle that a sentence of imprisonment imposed on a defendant for involuntary deviate sexual intercourse and corruption of minors is not supported where reports indicate that the Defendant had an extensive mental health problem,was diagnosed as suffering from schizophrenia, chronic undifferentiated type and schizophrenia, chronic paranoid type, and where the sentencing judge made no reference to the Defendant's history of mental illness. This court has not apparently addressed the issue of the placement of a mentally retarded individual in a State Correctional Facility

notwithstanding the ability of the trial courts to impose less restrictive and/or damaging forms of rehabilitation and/or punishment set forth in the Sentencing Guidelines of Pennsylvania or if the Guidelines violate the Eighth or Fourteenth Amendments. This Court can review the sentence of the Petitioner, and ensure that no abuse of discretion occurred in light of the following authorities. **Commonwealth v. Gilliam,** 448 A2d 89 (PA Super 1982); **Commonwealth v. Kroft**, 440 A2d 927, 294 PA Super 599 (1982). Generally, a trial court has jurisdiction to sentence within a range of punishment established by the legislature. **Commonwealth v. Rink**, 574 A. 2d 1078, 393 PA Super 554, appeal denied 586 A2d 922, 526 PA 654 (1990). The Common Pleas Court had discretion to suspend the Petitioner's sentence in connection with the imposition of probation. **U.S. v. Tabaka**, 982 F.2d 100 (PA1992).

The Pennsylvania Sentencing guidelines are set forth in 42 PA. C.S. 9721 and 204 PA Code section 303.9 (Appendix F). Under section303.2(3), (Appendix F) an eligibility for boot camp exists, and under 303.2(4), Intermediate Punishment Sanctions which are non-custodial apply in the forms of probation supervision, restitution, alcohol/drug treatment, house arrest, psychological counseling, and community service. Since the Petitioner suffers from a mental condition the sentence of imprisonment imposed by the trial court was an abuse of discretion and exceeded the norms underlying sentencing in this Commonwealth. **Commonwealth v.Sypin**, 491 A2d. 1371, 341 PA. Super 506 (1985).

Under 204 Pa. Code 303.2(3), Boot Camp eligibility

requirements include: sentence of confinement serving a minimum sentence of two (2) years or less; serving a maximum sentence of 5 years or less; person is less than 35 years of age, and conviction is not for homicide, kidnapping, rape, or robbery.

On the issue of probation, the legislature has taken away from courts the power to impose sentences of probation in cases where the person is convicted of an offense where the legislature imposes mandatory minimum sentences. **Commonwealth v. Filius**, 499 A2d 1078, 346 PA. Super 434(1985).

Under the Fifth Amendment to the United States Constitution the Petitioner is entitled to due process of law, under the Fourteenth Amendment the Petitioner is entitled to equal protection under the law and due process of law , and under the Eighth Amendment the Petitioner is entitled to protection from cruel and unusual punishment.

In the case at bar, the trial court failed to honor Petitioner's Motions for Extra-Ordinary Relief challenging the sufficiency of the evidence, Motion for Arrest of Judgment, Motion for Acquittal, Motion for New Trial, based on violations of Petitioner's rights under the 4th, 5th , 6th, and 14th Amendments to the U.S. Constitution, the Pennsylvania Constitution, and matters of record pre-trial and during trial (R.54A). Also, the court ignored the boot camp eligibility set forth in the sentencing guidelines table for the Offense of Aggravated Indecent Assault, a felony of the second degree, carrying an offense gravity score of 8 (R. 46A); Petitioner's requests for probation (R.46A-47A), the Presentence Report that recommended probation ,and sentenced the Petitioner to

24-48 months incarceration at a State Correctional Facility, merged Indecent Assault with Aggravated Indecent Assault, and 6-12 months on the Corruption of Minors Charge, served concurrently with the 24-48 months sentence. (R. 43A-60A).

Counsel for Petitioner argues that the evidence presented at trial does not support beyond a reasonable doubt, the convictions entered and further argues that the Petitioner was eligible for boot camp, house arrest, supervised probation, and/or psychological treatment considering his age, and current mental condition. Further, the sentencing court abused its discretion by failing to honor the defendant's eligibility for these programs, the recommendation of the Pre-Sentence Investigation recommending probation in lieu of incarceration, and substantially veered from the the norms of sentencing, especially for a Petitioner with mental retardation , provided under the previously cited authority.

The Superior Court relied on **Koren**, and reasoned that Petitioner's challenges did not advance a colorable argument that the sentencing court's actions were inconsistent with the sentencing code or contrary to fundamental norms underlying the sentencing process or compromised the Sentencing Code as a whole.

This Court has taken into account objective evidence of contemporary values before determining whether or not a particular punishment comports with fundamental human dignity that the Eighth Amendment protects. Also, the Constitutionality under an equal protection and due process analysis is imperative in reviewing Pennsylvania's treatment of aged and mentally retarded defendants subjected to stringent sentencing standards vis a vis other younger defendants

receiving greater flexibility in sentencing by virtue of their age and mental capacity. The issues of less restrictive forms of rehabilitation, punishment , and detention are significant issues which must be addressed by this court regarding mentally retarded Defendants such as the Petitioner .

CONCLUSION

In conclusion, this court should issue its Writ of Certiorari and accept jurisdiction over this cause in order to reconcile the abridgment of Constitutional rights and protections afforded to persons such as the mentally retarded Petitioner and other persons of the several states which are secured by the Constitution .

Respectfully Submitted,

Robert A. Zigmund, Esq.
Counsel of Record
714 The Chateau
1003 Easton Road
Willow Grove,PA 19090
(215) 657-1953

APPENDIX A

[FILED FEBRUARY 29, 1996]

IN THE SUPREME COURT OF
PENNSYLVANIA
EASTERN DISTRICT

CASE NO. 733 Eastern District
Allocatur Docket 1995

COMMONWEALTH OF PENNSYLVANIA
Respondent.

v.

GEORGE PETER KOSISKY,
Petitioner.

ORDER

PER CURIAM:

AND NOW, this 29 th day of February, 1996, the Petition for Allowance of Appeal is hereby DENIED.

TRUE COPY FROM THE RECORD
ATTEST: FEBRUARY 29, 1996

/S/_____
JOHN W. PERSON, JR.
Deputy Prothonotary
Supreme Court of Pennsylvania
Eastern District

APPENDIX B

[FILED AUGUST 16, 1995]

IN THE SUPERIOR COURT OF
PENNSYLVANIA
NO. 03702 PHILADELPHIA 1994

COMMONWEALTH OF PENNSYLVANIA
V.
GEORGE PETER KOSISKY, Appellant

Appeal from the Order in the Court of Common Pleas of Luzerne County, Criminal Division, No. 380 of 1993

NO. 00092 PHILADELPHIA 1995

COMMONWEALTH OF PENNSYLVANIA
v.
GEORGE PETER KOSISKY, Appellant

Appeal from the Judgment of Sentence in the Court of Common Pleas of Luzerne County, Criminal Division, No. 380 of 1993.

BEFORE: MCEWEN, TAMILIA, AND KELLY, JJ.

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this court that the judgment of the Court of Common Pleas of Luzerne County be, and the same is hereby affirmed. BY THE COURT:

Dated:August 16, 1995 /S/_____
Prothonotary

APPENDIX B-1

[FILED AUGUST 16, 1995]

IN THE SUPERIOR COURT OF
PENNSYLVANIA

NO. 03702 PHILADELPHIA 1994

COMMONWEALTH OF PENNSYLVANIA

v.

GEORGE PETER KOSISKY,

Appellant

Appeal from the Order in the Court of Common Pleas of Luzerne County, Criminal Division, No. 380 of 1993

NO. 00092 PHILADELPHIA 1995
COMMONWEALTH OF PENNSYLVANIA

v.
GEORGE PETER KOSISKY, Appellant

Appeal from the Judgment of Sentence in the Court of Common Pleas of Luzerne County, Criminal Division, No. 380 of 1993.

BEFORE: MCEWEN, TAMILIA, AND KELLY,JJ

MEMORANDUM:

George P. Kosisky appeals from the October 16, 1994, twenty-four (24) to forty-eight (48) month judgment of sentence imposed after he was found guilty, nonjury, of aggravated indecent assault,1 indecent assault2 and the corruption of minors.3,4 The charges stemmed from allegations of sexual abuse visited upon the nine-year old female victim by her great uncle, the 65-year old appellant.

Appellant raises several issues for this Court's consideration beginning with the argument the suppression court and trial court erred by admitting into evidence the narrative statement and waiver of rights form allegedly obtained in violation of his constitutional rights. Appellant also contends the narrative statement was inadmissible as an unverified document. Of particular significance, appellant argues, is his inability to read and his "borderline intellectual functioning," possessing an I.Q. of 68, which makes him unusually susceptible to the power of suggestion. (Appellant's brief at 25.)

In reviewing a court's decision to deny a defendant's motion to suppress, this Court must determine whether the record supports the factual findings and the legitimacy of the inferences and the legal conclusions drawn from those findings. **Commonwealth v. Mason,** 427 Pa. Super. 243, 628 A.2d 1141 (1993). As to evidentiary rulings by a trial court, a trial judge has broad powers concerning the conduct of a trial and particularly with regard to the admission or exclusion of evidence. **Commonwealth v. Kunkle,** 425 Pa. Super. 499, 623 A.2d 336 (1993). It is the Commonwealth's burden to establish, by a preponderance of evidence, a defendant's confession was voluntary and a waiver of his constitutional rights was knowing and intelligent. **Commonwealth v. Germann,** 423 Pa. Super. 393, 621 A.2d 589 (1993). In

determining the voluntariness of a confession and waiver of one's **Miranda**5 rights, the court must consider and evaluate the totality of the attendant circumstances.**Commonwealth v. Williams,** 537 Pa. 1, 640 A.2d 1251 (1994). The factor which must be considered in reaching a determination of whether an accused has voluntarily made a statement and waived his **Miranda** rights include the duration and method of interrogation, the conditions of the detention, police attitude, the defendant's physical and psychological state and any other conditions which may serve to drain one's power of resistance to suggestion and undermine his self-determination. **Commonwealth v . Carter,** 377 Pa. Super. 93, 546 A.2d 1173 (1988). The fact a defendant possesses a low I.Q. does not in itself render a confession involuntary. **Commonwealth v. Chacko,** 500 Pa. 585, 459 A.2d 311 (1983).

The record indicates defendant was contacted by the City of Pittston police and asked to come in to the station to discuss allegations of sexual misconduct. Appellant willingly came in for questioning, was advised he was a suspect in the sexual abuse of his niece and was informed of his constitutional rights. When asked, appellant acknowledged he was asked to come in to the station because his niece had "played with his privates." The interview took place in the office of the Chief of Police, behind an unlocked door. Police Chief Edward Doran testified he asked the appellant if he understood English, presented the **Miranda** waiver form to appellant and read each question and indicating appellant's response to each query on the form. The Chief added he then informally repeated defendant's constitutional rights before asking him to sign the waiver in acknowledgment thereof. Appellant was then interrogated by Chief Doran and in the presence of Sergeant Gregory Policare. The Chief stated appellant appeared cognizant and lucid at all time. At the

conclusion of the 25-minute interview, appellant's statement which the Chief had handwritten and Sergeant prepared in typed form was read to the defendant and he acknowledged its accuracy.

We find, based on the totality of the circumstances, appellant' statement was offered knowingly and intelligently.6 The fact the Chief's questions and appellant's responses thereto were initially penned on a yellow tablet and subsequently transcribed in typed narrative form by Policare, does not render the statement inadmissible on the basis of its lack of authenticity. See **Commonwealth v. Edimiston,** 535 Pa. 210, 634 A.2d 1078 (1993) (One means of identifying the authenticity of a document is by the testimony of a witness with knowledge of it preparation). The court, sitting as the finder of fact, found the narrative to be voluntarily obtained and adequately authenticated and admitted it into evidence, along with appellant's likewise voluntarily acknowledged and signed **Miranda** waiver form. There was no error.

Next, appellant argues the trial court should have allowed lay testimony by the victim, her father, appellant's niece and his sister-in-law regarding appellant's mental state. Such testimony, appellant contends, would have served to establish his vulnerability to suggestion, particularly during his interrogation by Chief Doran (N.T., 10/18/94, p.26).

As stated above, a judge has broad discretion with regard to the admission or exclusion of evidence, and this Court will not disturb a trial court's evidentiary ruling absent an abuse of discretion. **Commonwealth v. Wallace,** 522 Pa. 297, 561 A.2d 719 (1989). The trial court disallowed the proffered testimony regarding defendant's alleged mental disability reasoning the witnesses' observations to be

inappropriate and to constitute impermissible hearsay. Also, the issue of the appellant's alleged less than average intelligence and its impact or lack thereof on his ability to exercise good judgment had been addressed and disposed of at the suppression hearing, thereby making such testimony at trial irrelevant. We find the trial court did not err by excluding the lay opinion testimony regarding defendant's general mental state.

Appellant also contends lay testimony by four family members regarding his character and reputation should have been allowed. The court's ruling, appellant argues, "lessened [his] ability to counter the Commonwealth's case." [Appellant's brief at p. 26]

While a defendant may offer testimony about reputation as to character traits relevant to the crime with which he is charged, evidence of specific acts or instances may not be offered to show he did not have the tendency to commit the crime. **Commonwealth v. Brothers,** 409 Pa. Super. 202, 597 A.2d 1164 (1991). Personal opinions regarding an accused's good character are not admissible as reputation and character evidence. **Mason, supra.**

The record indicates favorable reputation evidence was indeed solicited from three of defendant's family members notwithstanding objections by the Commonwealth. Testimony by defendant's niece and nephew was precluded on the basis it merely would have been cumulative. We find appellant endured no prejudice and the court did not abuse its discretion by finding such lay testimony concerning defendant's character and reputation inadmissible.

Next, appellant argues the trial court erred by refusing his request to treat defense witness Joanne Van Swan, the caseworker for Children and Youth Services (CYS) assigned to the victim's case, as a hostile witness. Appellant contends had he been able to ask Van Swan leading questions regarding statements made by the victim at or near the time of the alleged assault, justice and fairness would have been better served.

It is within the discretion of the trial court whether to allow a party to cross-examine his own witness. **Commonwealth v. Bartley,** 395 Pa. Super. 137, 576 A.2d 1082 (1990) (Counsel may cross-examine his own witness on a plea of surprise when the witness has given unexpected testimony, contrary to statements made earlier by the witness, and harmful to the party calling the witness and beneficial to the opposing party).

The defense called Van Swan to testify as to what the victim told her during her interview with the child conducted shortly after the assault. The record indicates Van Swan, after reviewing her notes, offered a complete, detailed narrative of her interview with the victim. She also read verbatim the document produced by her and provided to the defense by the Commonwealth during discovery. It was only when Van Swan's recollection of her interview with the child did not comport with that expected by defense counsel that counsel requested the witness be treated as if on cross. We find the circumstances did not warrant such treatment of the witness.

The appellant also alleges the court erred by refusing to receive into evidence CYS documents regarding the victim's account of the assault. Appellant argues the records would

have impeached the victim's trial testimony, offered almost three years after the fact, that the appellant had digitally penetrated her vagina. Appellant contends the victim's trial testimony was "conditioned" by meetings with the prosecution, and the statements provided by her to CYS at the time of the incident would have been more reliable.

Not only does Pennsylvania law extend an absolute privilege regarding those communications between an alleged sexual assault victim and her counselor, see **Commonwealth v. Wilson,** 529 Pa. 268, 602 A.2d 1290 (1992), we find the exact information appellant wished to bring to the court's attention was repeated not once but twice by Van Swan. There was no error.

Next, appellant argues the evidence presented was insufficient to sustain his convictions for aggravated indecent assault, indecent assault and corruption of minors.

Next, appellant argues the evidence presented was insufficient to sustain his convictions for aggravated indecent assault, indecent assault and corruption of minors.

When considering a challenge to the sufficiency of the evidence, this Court is required to examine all evidence and reasonable inferences therefrom, in a light most favorable to the Commonwealth, and determine whether there was sufficient evidence presented to establish every element of the crime(s) charged, beyond a reasonable doubt. **Commonwealth v. Carter,** 537 Pa. 233, 643 A.2d 61 (1994). This standard is equally applicable to cases where the evidence is circumstantial rather than direct, so long as the combination of evidence links the accused to the crime beyond a reasonable doubt. **Commonwealth v. McCullum,** 529 Pa. 117, 602 A. 2d 313

(1992). As trier if fact, a trial judge may believe all, part or none of the evidence presented, and the determination as to the credibility of witnesses is within his sole province and will not be reversed on appeal.. **Commonwealth v. Melvin,** 392 Pa.Super. 224, 572 A.2d 773 (1990). "[E]ven uncorroborated testimony of a prosecution witness may be sufficient to convict, despite contrary evidence from the defense, if the trier of fact finds the former credible." **Commonwealth v. Wienckowski,** 371 Pa. Super. 153, 537 A.2d 866 (1988).

A person over 18 years of age commits aggravated indecent assault when he engages in nonconsensual penetration, however slight, of the genitals of an individual less than 14 years of age, with a part of the actor's body for any purpose other than good faith medical, hygienic or law enforcement procedures. 18 Pa. C.S. 3125. Indecent assault will be found where any intimate part of the victim's body is unwantedly brought into contact with any part of the defendant's body for the purpose of arousing or satisfying sexual desire in either person. **Commonwealth v. Grayson,**379 pa. Super. 55, 549 A.2d 593 (1988).

The victim testified the appellant, who was babysitting for her and her older brother on the evening of the assault, instructed her to change from her playclothes into her nightgown. When she returned to the room where the three had been watching television, her brother had left the room and the victim again sat on the appellant's lap where she had been seated earlier. Appellant then reached under his niece's nightgown, into her panties and began fondling her genitalia. When the brother unexpectedly reentered the room, appellant instructed the victim to secure a blanket to cover them so the assault could continue. The victim testified her uncle also placed her hand inside his unzipped pants on his penis. The

following day the victim related this incident to her third grade teacher, who, in turn, contacted the authorities. In his statement to police, appellant acknowledged he touched his niece but stated the action was instigated by the child. The trial judge sitting as the trier of fact found the child's testimony credible. We find the evidence supports the finding appellant indecently assaulted his nine-year old niece, entrusted to his care, and the evidence was sufficient to establish each element of the offenses with which he was charged.

Lastly, appellant argues the sentencing court erred by denying his motion for extraordinary relief and by failing to grant his request for boot camp, house arrest and/or probation, as an alternative to incarceration.

Appellant's "request for extraordinary relief" included his challenge to the sufficiency of the evidence, an issue already resolved by this Court. Appellant's challenge to the 24 to 48 month judgment of sentence, which falls within the standard range of the sentencing guidelines, does not advance a colorable argument the court's actions were inconsistent with the sentencing code, were contrary to fundamental norms underlying the sentencing process and/or compromised the sentencing code as a whole. See **Commonwealth v. Koren,**435 Pa. Super. 499, 646 A.2d 1295 (1994).

Having found each of appellant's arguments devoid of merit, we affirm the October 16, 1994 judgment of sentence.

Judgment of sentence affirmed.

Footnotes:

1. 18 Pa.C.S. 3125.

2. Id., 3126.

3. Id., 6301.

4. By per curiam Order, appellant's request to consolidate No. 00092 Philadelphia, 1995, an appeal from an interlocutory Order, and No. 03702 Philadelphia, 1994, the appeal from the imposition of sentence, was granted on May 30, 1995.

5. **Miranda v. Arizona,** 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966).

6. For ease of review, appellant's complete narrative statement is set forth below.

Narrative of interview held in the office of Chief of Police Edward G. Doran on 1/26/93 at 2:10 P.M., President was Chief Edward Doran, Sgt. Gregory Policare and accused George Kasisky [sic]. Mr. Kasisky was read his Miranda warnings and signed a waiver to this fact. The interview then went as follows:

What is your name and address? George Kasisky 455 S. Main St., Pittston, PA.

Did you understand the rights that were read to you? Yes I did.

Did you ever babysit the Kasisky children? A lot of times.

What are their names? Casey and Mickey.

Do you know why you are here, sir? Yes, because Casey came downstairs and started playing with my private.

Who's children are Casey and Mickey? My nephew' s Mickey Kasisky.

Did you let her play with your private? Yes, about 10 minutes.

Did you stop her? No.

When you say she was playing with your privatem, do you mean your penis? Yes.

How did she do this? She jumped up on my lap and put her hand down my pants.

How long did she do this? 10 minutes.

Did you ejaculate? No, wait a minute... What does that mean?

Did you have an orgasm...come? No, I have sugar. I can't.

What else did she do? She took my hand and put it on her private.

Did you stop her? No. I rubbed her private. She had night clothes on.

What do you mean by her private?.... Her vagina? Yes.

Did your finger go inside her vagina? Maybe a little bit and I quit.

What do you mean by a little bit? About this much. (Mr. Kasisky held his fingers apart about 1/4 inch.)

How long did you do this? About 10 minutes.

Did you like doing this? Yes. I guess.

Didn't it bother you because of her age? No.

Did it bother Casey? She was smiling and kissing me on the cheek.

Do you think what you were doing was normal? She wanted to do it.

Did Michael see what was going on? No. She got a blanket and covered us.

This was her idea? Yes.

Didn't you try to stop her at anytime? No.

Why? (Mr. Kasisky just rolled his shoulders.)

You just let her do what she wanted? Yes.

Did you ever do this to any other child? No.

Didn't you think that this was wrong? Yes, but kids are kids. I babysat for a whole year and this never happened before. Supplement Report, R.R.361-362A, Commonwealth Exhibit 1.

APPENDIX C

[FILED SEPTEMBER 16, 1994]

IN THE COURT OF COMMON PLEAS
OF LUZERNE COUNTY

COMMONWEALTH OF PENNSYLVANIA: :
: Criminal Division
Plaintiff
: No. 380 of 1993
vs.
:
GEORGE PETER KOSISKY
:
Defendant :

ORDER

AND NOW, this 16 th day of September, 1994 at 12:15 o'clock p.m. the Court, after reviewing the Defendant's Omnibus Pre Trial Motions and after discussion with counsel, the only issue before this court is the Motion to Suppress Statements; and thereafter taking testimony the Court ORDERS, ADJUDGES and DECREES that the Defendant's Omnibus Pre Trial Motion to Suppress Statements is DENIED.

The Defendant has a right to appeal this decision to Superior Court within thirty (30) days of receipt of this Order.

BY THE COURT:
/S/ M.T. CONAHAN

APPENDIX D

[THIS COURT ORDER OF JUDGE PATRICK TOOLE WAS ENTERED ON THE RECORD OF PROCEEDINGS (R. 357A) IN THE COURT OF COMMON PLEAS, LUZERNE COUNTY, PENNSYLVANIA ON OCTOBER 19, 1994]

"I very frankly have heard the evidence and I'm satisfied on the basis of the testimony presented that the defendant has, in fact, violated the aggravated indecent assault, as well as the indecent assault section of the crimes code as charged and the corrupting morals of a minor on the basis of these two acts and accordingly he is found guilty. I would schedule sentencing in this matter."

APPENDIX E

[THIS ORDER OF JUDGE PATRICK TOOLE WAS ENTERED ON THE RECORD OF PROCEEDINGS (R. 56A-58A) IN THE COURT OF COMMON PLEAS OF LUZERNE COUNTY, PENNSYLVANIA ON DECEMBER 16, 1994]

" I feel obligated to impose the sentence provided by the legislature, and the Defendant is thereby sentenced to a term of incarceration, the minimum of which shall be 24 months, the maximum of which shall be 48 months and this will be served in a state institution. He will be required to pay the costs of prosecution upon his release. I will direct too that the Defendant shall be evaluated and he shall receive any and all counseling and/or treatment that is required.

There's not much more I can say. I will afford him the right to continue on bail pending appeal if you tell me an appeal is going to be filed.

MR. ZIGMUND: I will file it this afternoon, Your Honor.

THE COURT: I am not going to ask you to do it. If you tell me that an appeal will be filed, I will afford you the opportunity to file the appeal and bail will be continued pending the appeal. If the appeal is filed within the applicable time period of 30 days, bail will continue until such time as the appeal is determined.

I will however, add some conditions to the bail at this time. They are the Defendant is not permitted to have any

contact with any children other than yours, because I am assuming he is going to continue to live with you. I will tell you that I don't want to confine him to the home, but I will indicate he is not to have any contact in any way with any young children. So, he is, therefore, not permitted to be a movie theatres, not to be in the park, and things like that.

I will also, advise him he has a right of appeal from the sentence imposed today. Any appeal must be filed within 30 days. I will expect that an appeal will be filed and bail will be continued pending the appeal. If the appeal is not filed and perfected, I am to be advised and the Defendant will be then given a date to report for commencement of this sentence.

Any other terms or conditionsdesired or required?

MR. ACIUKEWICZ: The two misdemeanor offenses, both of the first degree, indecent assault and corruption of minors.

THE COURT: I have a question about the indecent assault. I assume that merges, and I am going to treat it as such.

The corruption of minors, the sentence of the Court is that you will undergo imprisonment for a term the minimum of which shall be 6 months, the maximum of which shall be 12 months. That sentence shall be served concurrently with and not consecutive to the other sentence that I have imposed.

I think I have covered it all."

APPENDIX F

AMENDMENTS TO THE CONSTITUTION
AMENDMENTS I-X BILL OF RIGHTS

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when I actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor,and to have the assistance of counsel for his defense.

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 Pa.C.S. 5945.1
Confidential Communications with Sexual Assault Counselors

(a) Definitions- As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Coparticipant". A victim participating in group counseling.

"Rape Crisis Center". Any office, institution, or center offering assistance to victims of sexual assault and their families through crisis intervention, medical and legal accompaniment and follow-up counseling.

42 Pa.C.S. 5945.1 (Continued)
Confidential Communications with Sexual Assault Counselors

"Sexual Assault Counselor". A person who is engaged in any office, institution, or center defined as a rape crisis center under this section, who has undergone 40 hours of sexual assault training and is under the control and direct services supervisor of a rape crisis center, whose primary purpose is the rendering of advice, counseling, or assistance to victims of sexual assault.

"Victim" A person who consults a sexual assault counselor for the purpose of securing advice, counseling, or assistance concerning mental, physical or emotional condition caused or reasonably believed to be caused by a sexual assault. The term shall also include those persons who have a significant relationship with a victim of sexual assault and who seek advice, counseling, or assistance from a sexual assault counselor concerning a mental, physical, or emotional condition caused or reasonably believed to be caused by a sexual assault of a victim.

Confidential Communication." All information, oral or written, transmitted between a victim of sexual assault and a sexual assault counselor in the course of their relationship, including but not limited to any advice, reports,statistical data, memoranda, working papers, records or the like, given or made during that relationship.

42 Pa.C.S. 5945.1 (Continued) Confidential Communications with Sexual Assault Counselors

(b) Privilege-

(1) No sexual assault counselor may, without the written consent of the victim, disclose the victim's confidential oral or written communications to the counselor nor consent to be examined in any court or criminal proceeding.

(2) No coparticipant who is present during counseling may disclose a victim's confidential communication made during the counseling session nor consent to be examined in any civil or criminal proceeding without the written consent of the victim.

42 Pa. C.S. 9721 Sentencing Generally

(a) General Rule- In determining the sentence to be imposed the court shall, except as provided in subsection (a.1) consider and select one or more of the following alternatives, and may not impose them consecutively or concurrently:

(1) An order of probation

(2) A determination of guilt without further penalty

(3) Partial confinement

(4) Total confinement

(5) A fine

(6) Intermediate punishment

42 Pa. C.S. 9721 Sentencing Generally
(Continued)

(a.1) Exception - Unless specifically authorized under section 9763 (relating to sentence of intermediate punishment) subsection (a) shall not apply where a mandatory minimum sentence is otherwise provided by law.

(b) General Standards - In selecting from the alternatives set forth in subsection (a) the court shall follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim, and on the community and the rehabilitative needs of the defendant. The court shall also consider any guidelines for sentencing adopted by the Pennsylvania Commission on Sentencing and taking effect pursuant to section 2155 (relating to publication of guidelines for sentencing) . In every case in which the court imposes a sentence for a felony or a misdemeanor, the court shall make as part of the record, and disclose in open court at the time of sentencing a statement of the reason or reasons for the sentence imposed. In every case where the court imposes a sentence outside the sentencing guidelines adopted by the Pennsylvania Commission on Sentencing pursuant to section 2154(relating to adoption of guidelines for sentencing) and made effective pursuant to section 2155, the court shall provide a contemporaneous written statement for the reason or reasons for the deviation fron the guidelines. Failure to comply shall be grounds for vacating the sentence and resentencing the defendant.

42 Pa.C.S. 9721 Sentencing (Continued)

(c) Restitution- In addition to the alternatives set forth in subsection (a) of this section the court may order the defendant to compensate the victim of his criminal conduct for the damage or injury that he sustained.

(d) Detailed Criteria - With respect to each alternative the criteria to be considered by the court are set forth in this subchapter.

(e) Term of Imprisonment - All sentences of imprisonment imposed under this chapter shall be for a definite term.

18 Pa. C.S. 3125 Aggravated Indecent Assault

Except as provided in sections 3121 (relating to rape) 3122 (relating to statutory rape) and 3123 (relating to involuntary deviate sexual intercourse) a person commits a felony of the second degree when he engages in penetration, however slight, of the genitals or anus of another with a part of the actor's body for any purpose other than good faith medical, hygienic, or law enforcement procedures if:

(6) he is over 18 years of age and the other person is under 14 years of age.

18 Pa. C.S. 3126 Indecent Assault

(a) Offense defined - A person who has indecent contact with another not his spouse or causes such other to have indecent contact with him is guilty of indecent assault if:

(6) he is over 18 years of age and the other person is under 14 years of age.

(b) Grading - Indecent assault under subsection (a)(6) is a misdemeanor of the first degree. Otherwise indecent assault is a misdemeanor of the second degree.

18 Pa.C.S 6301 Corruption of Minors

(a) Offense Defined- Whoever being of the age of 18 years and upwards, by any act corrupts or tends to corrupt the morals of any minor less than 18 years of age, or who aids, abets, entices, or encourages any such minor in the commission of any crime, or who knowingly assists or encourages such minor in violating his or her parole or any order of court, is guilty of a misdemeanor of the first degree.

204 Pa. Code 303.9 Sentence Range Charts

(a) All guideline sentence ranges are months of minimum confinement as defined in 42 Pa.C.S> 9755 (b) and 9756 (b) (relating to partial and total confinement).

(b) Guideline sentence ranges are shown in the following chart for each combination of offense gravity score and prior record score, except for violations of 75 Pa.C.S. 3731 and 3735 which are assigned guideline penalties in 303.5 (relating to

204 Pa. Code 303.9 Sentence Range Charts
(Continued)

driving under the influence of alcohol or controlled substance and homicide by vehicle while driving under the influence, and except for violations of the Controlled Substance , Drug, Device, and Cosmetic Act (35 P.S. 780-101 - 780-144) which are assigned guideline sentence ranges in subsection (c) below.

Offense Gravity Score	Prior Record Score	Standard Range	Aggravated Range	Mitigated Range
8	0	24-48*	48-60	18-24*

*Indicates eligibility for boot camp programs. See 303.2(3).

204 Pa Code 303.2(3) Bootcamp Program Eligibility

Determine whether the defendant is in the guideline range recommending boot camp. Defendants who meet he following criteria are eligible for boot camp:

(i) sentenced to a term of confinement under the jurisdiction of the Department of Corrections.

(ii) serving a minimum sentence of two years or less

(iii) serving a maximum sentence of five years or less

204 Pa Code 303.2(3) Bootcamp Program Eligibility (Continued)

(iv) is less than 35 years of age; and

(v) whose current conviction is not for one of the following offenses:

(A) 18 Pa.C.S. 2501 (relating to criminal homicide)

(B) 18 Pa.C.S. 2901 (relating to kidnapping)

(C) 18 Pa.C.S. 3121 (relating to rape)

(D) 18 Pa.C.S. 3123 (relating to involuntary deviate sexual intercourse

(E) 18 Pa.C.S. 3701 (a)(i)(ii) or (iii) relating to robbery.

204 Pa. Code 303.2 (4) Intermediate Punishment Sanctions

Determine whether the defendant is in the guideline range recommending intermediate punishment. Intermediate punishment program option include all of the following:

(i) Noncustodial programs which involve close supervision, but not housing, of the offender in a facility, including but not limited to:
intensive probation supervision
victim restitution or mediation

alcohol or drug outpatient treatment

house arrest and electronic monitoring

psychiatric counseling, and

community service

(ii) residential inpatient drug and alcohol programs based on objective assessments that an offender is dependent on alcohol or drugs or a residential rehabilitative center;

(iii) individualized service which evaluate and treat offenders, including psychological and medical services, education, vocational training, drug and alcohol screening and counseling, individual and family counseling and transportation subsidies; and

(iv) partial confinement programs, such as work release, work camps, and halfway facilities.

[The provisions of this 303.2 amended July 1985 and applies to sentences for crimes committed after January 1, 1986, 15 Pa. B. 2447; as announced at 16 Pa. B. 439 (February 15, 1986).]